APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1554

COUNTY COURT ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK,

Petitioners,

against

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 28, 1978
CERTIORARI GRANTED OCTOBER 2, 1978

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-5896

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

EILEEN F. SHAPIRO
Assistant Attorney General

PATRICIA C. ARMSTRONG
Assistant Attorney General
of Counsel

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

INDEX

Chronological List of Relevant Docket Entries.

October 28, 1976 —Petition for Writ of Habeas Corpus filed

October 28, 1976 —Petitioners' Appendix filed

December 7, 1976 —Memorandum of law in opposition to Writ of Habeas Corpus and photocopy of trial transcript filed

January 3, 1977 —Petitioners' memorandum of law filed

January 17, 1977 —Respondents' supplementary Memorandum of Law filed

April 21, 1977 —Memorandum and Order granting writ of Habeas Corpus (OWEN, J.) filed

April 28, 1977 —Order setting aside convictions and releasing petitioners from custody filed (OWEN, J.)

May 23, 1977 —Respondents' notice of appeal fled

November 29, 1977—Opinion and Order of the Court of Appeals for the Second Circuit filed

February 1, 1978 —Orders denying petition for rehearing containing a suggestion that the action be heard *en banc*

Petition for a Writ of Habeas Corpus, filed United States District Court, October 28, 1978.

Judge Owen

76 Civ. 4794

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL ALLEN, RAYMOND HARDRICK and MELVIN LEMMONS,

Petitioners,

against

COUNTY COURT, ULSTER COUNTY, NEW YORK, WARDEN, Woodbourne Correctional Facility, Woodbourne, New York,

---

The relator, J. Jeffrey Weisenfeld, on behalf of petitioners, Samuel Allen, Raymond Hardrick and Melvin Lemmons, respectfully represents:

1. Petitioners, Samuel Allen, Raymond Hardrick and Melvin Lemmons, in County Court, County of Ulster, were each convicted of two counts of possession of a gun as a felony (within the Southern District of New York).

On June 28, 1974, Hardrick and Allen were sentenced to seven years imprisonment on each count, said sentences to run concurrently (Mino, J.) Allen has been paroled, after serving more than two years of his sentence.

On August 22, 1974, petitioner Lemmons was sentenced to seven years imprisonment on each count; sentences to run concurrently (Mino, J.) These sentences are to begin upon the completion of a ten year sentence imposed upon Lemmons in an unrelated Federal case in the District of Michigan.

Petition for Writ of Habeas Corpus, filed United States District Court, October 28, 1978.

Hardrick is presently incarcerated upon an unrelated Federal case. His sentence on this conviction is to begin upon completion of his Federal sentence.

Timely notice of appeal were filed on behalf of all the petitioners and on July 2, 1975, the Appellate Division Third Department affirmed the judgment of conviction without a written opinion. Two justices concurring in part and dissenting in part in a written opinion (opinion annexed as Exhibit "A").

On August 6, 1975, Hon. Louis M. Greenblott, granted leave to appeal to the Court of Appeals and a timely notice of appeal was filed August 19, 1975.

In an opinion dated July 15, 1976, the Court of Appeals (Wachtler and Fuchsberg, J., dissenting) affirmed the order of conviction (opinion annexed as Exhibit "B").

2. Petitioners petition for a writ of habeas corpus on the ground that the statutory presumption of possession (§ 265.15(3) P.L.) is unconstitutional on its face and as applied to them.

3. On May 8th to May 14th, 1974, a jury trial was held before Hon. Raymond J. Mino. All the petitioners were convicted of two counts of possession of a weapon. The only pertinent facts are those which relate to those weapons.

All petitioners and Jane Doe, a co-defendant below, were driving in an automobile on the New York State Thruway (references are to the appendix in the State Court of Appeals annexed hereto as Exhibit "C") (A172). The automobile was stopped for a speeding violation (A169). The driver of the automobile, Lemmons, was arrested on the basis of an alleged Michigan warrant (A190).

After the arrest of Lemmons, Officer Askew returned to Lemmons vehicle (A192). Lemmons had been driving. Doe was in the front passenger's seat, and Allen and Hardrick

were in the rear (A192). As he approached the car, Askew walked around the front of the vehicle to the passenger's side (A192). He testified that he saw a pocketbook with a portion of a gun showing, lying on the floor of the front seat, between Doe and the door (A192, 213, 204-205). This pocketbook was seized and it was discovered to contain two guns. The pocketbook contained documents relating to Doe and when asked if the pocketbook were hers, she admitted that it was (A205). The guns formed the basis of the conviction of petitioners.

After the People's case, defense counsel moved to dismiss the charges; specifically, it was pointed out that the weapons in question were found "upon the person" of Doe and for this reason, the statutory presumption under Section 265.15 did not apply. The motion was denied.

At the end of the entire case, the Court charged the jury as follows:

> Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.
>
> In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.
>
> To prove their accusations beyond a reasonable doubt, the People here introduced evidence—and I am going to very briefly outline it—to establish the stopping of the automobile on the Thruway; that the automobile was occupied by the four defendants at the time the automobile was stopped; that two concealable weapons or handguns were found in the purse of one of the defendants which was either on the front seat or on the floor in the front of the automobile; and that thereafter a search of the trunk disclosed a machine gun and the heroin. (A362-363).

Petitioners, Allen, Hardrick and Lemmons moved to have the verdict set aside on the ground of insufficient evidence. This motion was denied.

4. The only evidence in this case pertaining to the charge for which Allen, Hardrick and Lemmons were convicted was that two guns were found in Doe's pocketbook. This pocketbook was found on the floor of the car near where Doe had been sitting.

Under these circumstances, the conviction of Allen, Hardrick and Lemmons for possession of these weapons cannot stand.

First, under the very terms of the statute, Section 265.15 (3) P.L., no presumption can arise where the weapon is found on the person of a particular party. Here, the possession of the guns can only be attributed by Doe. These weapons were found in her pocketbook. A woman's pocketbook is clearly on her person and numerous cases have, in analogous circumstances, so held. For example, in *People* v. *Pugach,* 15 N.Y. 2d 65 (1964), cert. denied 380 U.S. 936, the Court of Appeals upheld the "frisk" of defendant's briefcase even after it had been taken from defendant and was in possession of a police officer. The Court stated:

> The fact that the loaded gun was found concealed in the brief case, rather than in a pocket of defendant's

> clothing, affords no grounds for saying that this "frisk" was in reality a constitutionally protected search. The loaded firearm concealed in the brief case carried in the hands of the defendant was in the language of the statute "concealed upon his person" (Penal Law Section 1897). (The predecision to § 265.15 P.L.) Id. at 69.

People v. *Moore,* 32 N.Y. 2d 67, 71 (1973) ("frisk" of defendant's handbag permitted). See *People* v. *Bowles,* 29 A.D. 2d 996 (3d Dept., 1968) ("frisk" of defendant's trousers which were on the floor of defendant's room).

It is clear that contraband contained in the handbag of one of the passengers of an automobile is contraband "concealed upon the person" of that occupant and that occupant alone. The mere fact that at the time of the discovery and seizure Doe was not physically holding her bag is not significant.

In *Pugach,* the discovery was made after the police had custody of the briefcase. In *Moore,* the same is so of the handbag, and in *Bowles,* the same is true of the trousers. *People* v. *Davis,* 52 Misc. 2d 184, 185 (Sup.Ct. Queens Co., 1966); *People* v. *Desthers,* 343 N.Y. 2d 887 (Crim.Ct., City of N.Y., N.Y.Co. 1973); *People* v. *Garcia,* 41 A.D. 2d 560 (2d Dept., 1973); *People* v. *Rivera,* N.Y.L.J. 9/18/74 p. 17 col. 6 (Special Narcotics Courts, N.Y.C., 1974).

Doe was the only woman in the automobile, the pocketbook was seen between her leg and the door immediately prior to the seizure. When questioned Doe admitted ownership. Moreover, there were documents in the purse which indicated Doe's ownership. Under these circumstances, the presumption set out in Section 265.15 cannot arise as to Allen, Hardrick and Lemmons.

Second, if the presumption is applicable here, then it is unconstitutional both on its face and as applied.

In *Leary* v. *United States,* 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id. at 36.

The New York test has been held to basically conform to that set out in *Leary;* though the actual language is somewhat different (i.e., "based on life and life's experiences", there is a "fair", "natural" and "rational" connection between the fact proved and the fact to be presumed or inferred). *People* v. *McCaleb,* N.Y. 2d 394, 400-401 (1969); *People* v. *Terra,* 303 N.Y. 332, 335 (1951) app. dism'd 342 U.S. 938; *People* v. *Reisman,* 29 N.Y. 2d 278, 286 (1971).

Under the circumstances of this case, there is absolutely no basis upon which to find that possession by petitioners of these guns is more likely than not to flow from the finding of these guns within the automobile. An attack upon the constitutionality of the presumption was made in *Stubbs* v. *Smith,* —— F.2d —— (2d Cir. 1976) slip.op. p. 2913 (4/2/76). The Court there found it unnecessary to determine the issue of the constitutionality of the presumption. The Court found that since the petitioner was convicted of an assault with the gun, there was a basis for the conviction of possession of the gun independent of the presumption. Therefore, even if the presumption was unconstitutional, the error was harmless.

Such is not the case here, where the conviction was based entirely upon the use of the presumption. See *People* v. *DiLandri,* 250 App.Div. 52 (1st Dept., 1937). Thus, the validity of the presumption is clearly at issue. The majority opinion in the New York Court of Appeals goes into the history and necessity of the statutory presumption, but paid no attention at all to articulating the rational connec-

tion between the proven and presumed facts. Ease of conviction is no substitute for the required rational connection.

Further, in *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975) the Supreme Court indicated that in some instances, at least, affirmative defenses which shift the burden of proof are a violation of due process. Evidently, the Court understood full well that there is a significant interplay between affirmative defenses and presumptions; that an affirmative defense can be phrased as a presumption and vice versa (e.g. It shall be a crime to be in a car with a gun; but it is an affirmative defense that the gun was on the person of one of the occupants. Or, it is illegal to possess a gun. All persons found in a car with a gun are presumed to possess it unless it is found upon the person of one of the occupants). With this interplay in mind, the Supreme Court reiterated the requirement of a rational connection between proven and presumed facts. Id. at 702 n.31. However, the Court did not comment on a circumstance such as here, where the trier of fact is required to find possession and possession is the crime charged. Here, the operation of the presumption is no mere procedural device shifting only the burden of production. Here, there is a virtual shift in the burden of persuasion. See, *Byrd* v. *Hopper,* —— F.Supp. —— (U.S.D.C., N.Ga.1975); 18 CrL. 2148.

At the very least, *Mullaney* requires a hard look at statutory presumptions to make sure they are rational. This statutory presumption is invalid on its face for there is no rational connection between a gun being in a car and possession by each occupant. This presumption now permits a passenger to be convicted of possession of a gun found in a locked trunk or glove compartment of the car. Such a presumption cannot stand.

Even if the presumption were constitutional on its face, it is clearly unconstitutional as applied. These guns were

found in Doe's handbag, which was between her leg and the door of the front passenger's seat. The pocketbook had Doe's papers in it and Doe admitted it was her bag. Lemmons was out of the car at the time of the seizure and Hardrick and Allen were in the rear of the car. The New York Court of Appeals, in its opinion, states absolutely no reasons why there is a sufficient rational connection between the finding of the gun and the possession by petitioners. This absence in the majority opinion results from there being no rational connection between the guns in the pocketbook and possession by all the occupants.

5. The charge of the trial court denied petitioners due process in that it failed to charge a necessary element of the crime; namely, that the conviction could only be had if the jury found that the guns in question were not upon Doe's person. So too, the charge was improper in that it made no mention of scienter, but relied upon the presumption. *People* v. *Robledo,* N.Y.L.J. 9/27/76, p.21 c.4 (Sup. Ct.N.Y.Co.). The failure to object to the charge or raise the issue in the State Court does not preclude relief in the Federal Courts, since there was no deliberate by-pass, there being no tactical reason for the failure to object. *Kibbie* v. *Henderson,* —— F.2d —— (2d Cir., 1970) slip.op. 75-2128 p. 3081 (4/8/76) cert. granted —— U.S. —— (1976).

6. The petitioners were convicted on less than proof of guilt beyond a reasonable doubt. Even if the presumption set out in § 265.15 is constitutional and applicable here, the conviction was still had upon less than a finding of guilt beyond a reasonable doubt. Here, the necessary element of scienter or mens rea is not supplied by the presumption. The presumption merely supplies constructive possession and not mens rea and therefore, petitioners here were improperly and unconstitutionally convicted. *People* v. *Ro-*

Petition for Writ of Habeas Corpus, filed United States District Court, October 28, 1978.

bledo, N.Y.L.J. 9/27/76 p.21 c.4 (Sup.Ct., N.Y.Co.); *In re Winship,* 397 U.S. 358 (1970); cf. *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975).

In the trial court, petitioners' counsel moved to dismiss the charges and to set aside the verdict on the grounds that the evidence of guilt was insufficient. The argument in the Appellate Division and the Court of Appeals was phrased in the same language. Thus, the issue was clearly preserved for the Federal Courts. In any event, there was no deliberate by-pass of the issue. *Kibbie* v. *Henderson, supra.*

7. Petitioners have exhausted their state remedies.

WHEREFORE, petitioners pray that the Writ be granted and an order be entered reversing the judgments of conviction, discharging them from custody and for such other and further relief which may to the Court seem just and proper.

Dated: New York, N. Y.
October 26, 1976

J. JEFFREY WEISENFELD
J. JEFFREY WEISENFELD

(Verified, October 26, 1976.)

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment —May 13, 1974.

(415) STATE OF NEW YORK

COUNTY COURT

COUNTY OF ULSTER

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

MELVIN LEMMONS, RAYMOND HARDRICK, SAMUEL ALLEN and MARCELLA MURPHY,

Defendants.

Stenographic transcript of proceedings held in the above-entitled matter on the 13th day of May, 1974, at a Regular Term of County Court, held in and for the County of Ulster, at the Ulster County Court House, Kingston, New York, before the HON. RAYMOND J. MINO, County Judge, presiding, and a jury.

APPEARANCES:

HON. ELLEN G. DONOVAN
Assistant District Attorney
Appearing for the People

EWIG, KLEIN & KLEIN, Esqs.
Attorneys for Defendant
Melvin Lemmons
65 John Street
Kingston, New York

By: AARON E. KLEIN, Esq.,
of Counsel.

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment—May 13, 1974.

(547) Miss Donovan: Yes, Your Honor. I think that what Mr. Goldberger is doing is arguing facts that are more properly heard by a jury. There has been testimony she was in the car, that—

The Court: He said you didn't prove—

Miss Donovan: I feel we did.

The Court: What did you prove?

Miss Donovan: We placed her in the car with these other three defendants.

The Court: Other than that what did you prove?

Miss Donovan: Proved that she was armed with at least two guns.

The Court: I am not talking about that. I am talking about what was found in the trunk.

Miss Donovan: Your Honor, I would rely on the presumption.

The Court: That's all you proved, that she was a passenger in the car.

Miss Donovan: That's right.

The Court: Therefore the presumption was she—

Miss Donovan: Has knowledge.

(548) The Court: That's the basis of your contention?

Miss Donovan: Yes, Your Honor.

The Court: I will deny your motion at this time, Mr. Goldberger.

Mr. Klein: We are going in the order as we sit across the counsel table. On behalf of the defendant Melvin Lemmons I join in the general motion to dismiss this case on the grounds that as to him the People have failed to make out a prima facie case, and more specifically—

The Court: In that?

Mr. Klein: More specifically I would like in his case to do a little analysis of what we have here. The presumption

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment—May 13, 1974.

statute on firearms, 265.13, does not include the weapon as a firearm known here as People's Exhibit 7-A.

The Court: What weapon is that?

Mr. Klein: Pardon?

The Court: What is 7-A?

Mr. Klein: 7-A is this weapon, the large weapon.

The Court: The semi-automatic gun?

(549) Mr. Klein: Right. The statute does not extend a presumption to possession of that weapon by all of the occupants of the car.

The Court: What section?

Mr. Klein: 265.15 of the Penal Law. The only time it does apply is when it is a stolen. The only time the presumption of being in an automobile applies to all of the occupants of the car is negated is by certain exceptions such as where the weapon is found upon the person of one of the other occupants of the car. In this case the proof adduced by the Prosecution is that a car was stopped, Mr. Lemmons is the operator of the car, he is told he is going to get a ticket and he can mail it in and he waits as the trooper goes back, presumedly fills in a ticket. The trooper than comes back to the car, asks Mr. Lemmons, without arresting him then and there, to accompany him back to the patrol car, and at the patrol car an arrest is made.

Now, the weapons are found on the person of one of the other parties in a handbag belonging to one of those other parties. I see no way, with (550) all due respect, to extend the presumption in a case like that to this defendant, and I respectfully ask that count one of the indictment be dismissed as to the defendant Lemmons.

The Court: Count one has to do with the weapon?

Mr. Klein: That is the weapon.

Mr. Goldberger: There is at least two counts, I would believe, for the two guns in the purse.

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment—May 13, 1974.

Mr. Klein: There are two separate counts.

Miss Donovan: There are three. Count one—

The Court: Count one is not a weapon.

Mr. Klein: I am sorry. Let's do it right. I am sorry. I don't have it in my hand. The possession of a dangerous weapon under 265.05 is the second count, and it also applies to the third count and the fourth count.

The Court: Your motion now is to dismiss which count?

Mr. Klein: Well, I made a motion on the count which includes the .45. First of all I will (551) take count 265.05, Subdivision 2—that is the possession of a .45 automatic pistol loaded with ammunition found in the possession or on the person of another occupant of the vehicle, particularly at a time when the defendant Lemmons wasn't even in the vehicle and he had long since been placed under arrest.

The Court: Long since? I thought it was a matter of minutes.

Mr. Klein: A considerable time before.

The Court: Go ahead.

Mr. Klein: I also press that same motion regarding the fourth count which is a .38 caliber revolver also found on the very self same person, according to the testimony.

The Court: Miss Donovan, do you wish to address the Court as to those two motions to dismiss the third and fourth count of the indictment as to Lemmons?

Miss Donovan: Yes, Your Honor. I feel that the fact that the guns were admittedly found in the purse, were not actually in the defendant Murphy's hands—I feel that it is a question of (552) fact how the guns got there, who put them there.

The Court: He is saying that the only proof you have again is your presumption; right?

Miss Donovan: Correct.

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment—May 13, 1974.

The Court: He was in the car, and the statute presumes. You have no other proof?

Miss Donovan: Right.

The Court: The guns were in the car. Denied. Denied.

Mr. Klein: Denied. Now, the other count to be specific is count two which is possession of a machine gun under 265.05, Subdivision 1. I already stated that a presumption does not extend to such a weapon under that statute or under the statute 265.15.

The Court: Well, I don't have a Penal Law with me right now, but I was under the impression it did. If you are correct, I will have to examine it. That's all. You say it does?

Miss Donovan: I believe it does. I don't have a copy of the Penal Law with me either.

The Court: Just a minute. Miss Donovan says it does. I was under the impression it did, but (553) I am not sure. In other words, you are contending that that is a machine gun, that there is no presumption prescribed by statute; is that correct?

Mr. Klein: Yes, that extends to that type of gun.

The Court: Machine gun.

Mr. Klein: Now, I also move the dismissal of the first count of the indictment which charges the possession, criminal possession of a dangerous drug in the first degree, violation of Section 220.23 on the ground there has been no connection made as between the defendant Melvin Lemmons and any dangerous drug in the trunk of the vehicle based upon the whole evidence, the incredibility of the whole evidence, the unacceptability of the whole evidence regarding possession or constructive possession in the trunk of the vehicle.

The Court: On those grounds I will deny your motion.

Mr. Klein: And then I have a blanket motion, and

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment—May 13, 1974.

that is that the entire search and seizure here was illegal and that the four charges in this information all are based upon the fruits (554) of an illegal search and seizure and that all four charges should be dismissed on that ground.

The Court: Denied.

Mr. Torraca: Your Honor, on behalf of the defendants Hardrick and Allen I likewise join in the previous motions made by my two colleagues on behalf of Lemmons and/or Marcella Murphy. In addition, to wit: I move this court to dismiss count three involving the .45 automatic pistol and count four involving the .38 caliber revolver, that there is no proof in the record that the defendants Hardrick and Allen were in possession of these particular weapons. The weapons at all times were on the person of another subject in the vehicle.

The Court: My recollection of the testimony is that they were in her purse.

Mr. Klein: Well, the purse being part of the person, Your Honor, similar—

The Court: I am aware of that. In other words, you are contending that if I carry a satchel around, it is part of my person? If I put it on the floor, it is still part of my person; is that correct?

(555) Mr. Torraca: If you put it on the floor of the car, it is somewhat different, but if it is in a pocketbook belonging to a person, it is not in the car itself.

The Court: That is your interpretation; right?

Mr. Torraca: Right, yes, sir.

The Court: Based upon that you say they have not proved even with the presumption that your clients were in possession of any handguns?

Mr. Torraca: Well, not only with the presumption, there is no proof in the case at all.

Excerpt from Trial Transcript (pp. 415, 547-556). Colloquy—Respondents' Motion to Dismiss Indictment—May 13, 1974.

The Court: So I thought there was proof, one, there was a car, that there were four people in the car, that they found two guns in the car. I think that is proof of something. There is a presumption.

Mr. Torraca: Proof of the presumption—

The Court: It is not proof of the presumption.

Mr. Torraca: My clients exercised no dominion or control over the purse that was on the person of the other subject. The statute was (556) intended when a weapon is in a glove compartment or in the car itself but not on the person—

The Court: I am aware of what the statute was intended for, but there seems to be a question in my mind whether or not "on the person" means a purse; not in the physical control or possession, you know.

Mr. Torraca: Well, possession could be in your belt; it could be in your pocket; but when it is in a purse or portfolio—

The Court: On that basis I will deny your motion.

Mr. Torraca: In addition, I move that the first and second count be dismissed as to the defendants Hardrick and Allen in that again there is no proof in this case other than these items in these respective counts were in a locked trunk that Hardrick and Allen, as well as the others, had no dominion, exercised no dominion or control over the articles in that trunk. Just a bold presumption that exists. That was never the intent of the statute for that purpose.

The Court: What was the intent?

Excerpt from Summation to the Jury by Counsel to Jane Doe (Tr. 619-624), May 14, 1974.

(619) Let me get now to the two guns in the purse. The purse hers? Yes. The guns? No. The last thing in the world that I would want to do or that I would want you to think that I was doing was trying to con you because, Good Lord, I am not going to suffer from this. If you think that I am a kind of a shyster or con man that is trying to fool around with you and play hocus-pocus with you, you will take it out on her and not on me. I don't want you to do that. The purse is hers, the guns are not, and I think I can prove it to you.

Facts. Emsing went over to the car when he first stopped the car. He flagged it down. He looked—his testimony is that he looked in the window when he was talking to Lemmons. Emsing did not see a purse or any guns. All right? He did see some clothing in the back and some other things, but he did not see, although he testified as a (620) trained observer—he did not see the purse. All right. Possible?

Emsing goes back to the troop car. They are going to write the ticket. Askew comes back and gets Lemmons. Askew comes back with Lemmons. I brought out carefully to this jury—you may have thought I was a madman. I brought out carefully to this jury that there were time hiatuses in between. The officers testified two, three, four minutes from when Emsing went back to the car, when Askew went back and got Lemmons and put him under arrest. Their eyes were not, they testified, always on the defendants, the other three defendants in the car. All right. Time hiatus, two, three, four minutes.

The position when Askew says—and I will go with Askew's testimony. I don't think it is truthful in regard to how he saw it, but I will go with it. Assume the worse, okay? Assume it is a hundred per cent true. Mr. Klein can have a field day with that, but I don't care about that. I will assume it is true.

Excerpt from Summation to the Jury by Counsel to Jane Doe (Tr. 619-624), May 14, 1974.

We went through a demonstration as to how those guns were in the purse. I believe that (621) you all remember that the gun was in the purse in the sense that the .38 was crossways, keeping the purse open, and the .45 was on top. I am going to just ask you to be fair. Do the guns appear—they are all in evidence; you can take them in the jury room with you, and you can look at them, and I want you to go through the demonstration yourself. Does it appear to you, as it does to me, that the guns were jammed into this thing pretty quickly by somebody? Because, if they are Marcella Murphy's guns and they were in the purse all along—and assume the worse, that the purse was open. What did Miss Murphy have to do during that period? She shuts the purse. There can't be any search of the car unless he sees the guns from outside. If they are Miss Murphy's guns, and assuming she has them all along and assuming she has decided to keep it open, when Emsing and Askew and Lemmons are back at the other car, what would she do unless she is intending to take out the cannons and blow away the police officers? She does this (indicating). Remember, I had Askew do it. Case closed. Can't go in the purse then because you can't see anything from out- (622) side.

I want you to take these guns into the jury room. She was 16 then. Do you think these two cannons belonged to her? Listen, I am the first one to say it looks bad. I mean, the guns are in her purse. What are we supposed to do? But if we didn't need jurors, if we need robots, there wouldn't be anything for you to analyze. There wouldn't be any reason for you to be sifting what was going on.

Wouldn't she have zipped the purse if they were her guns? Why would she leave the purse open when Askew was coming around; whether he had his gun drawn or not, I don't remember. If she wanted to hide the fact she had two

Excerpt from Summation to the Jury by Counsel to Jane Doe (Tr. 619-624), May 14, 1974.

guns, that they are her two guns, that she is Two-Gun Annie, why wouldn't she just go like this (indicating) and zip it closed? She had absolutely no control over those two guns, and she didn't put them in that purse. I am not going to tell you who did, but use your judgment as to where the guns came from and whose guns they were.

Factors which mitigate against them being (623) her gun is the size of the guns. These are cannons. A .45 automatic is a cannon; so is a .38. I am not saying it is impossible for a 16-year-old girl—I am not saying it is impossible for her to have had that gun or two guns. The weight of the guns—you remember, the weight of these guns is less now than it would be if you put the clip and the bullets in them. I don't know exactly how much they weigh. I am not a gun expert, all right, but it would be even heavier. Take the guns into the jury room and feel them.

And most important of all, I think the main factor in showing you why the guns are not hers is that there is two of them. There is two guns. She is going to carry two guns in her purse? Assuming she is a gun-toting 16-year-old kid, she is going to carry two of them? Isn't one of them enough?

The guns came from somebody else, and in the hiatus period when everybody is back at the car and seeing Lemmons is getting arrested, there isn't any question about it—I don't think there is in your minds, if you are fair—somebody (624) stuffed the guns in her purse because the purse probably is the safest place; right? Lady's purse, young girl's purse, maybe the last place to look except when the guns went in there, she probably didn't know it or was so darned excited about it that she didn't even zip the purse closed.

Can you ask yourselves and examine your own minds and hearts and say to yourselves, "I believe that those two guns

Excerpt from Summation to the Jury by Counsel to Respondents Hardrick and Allen (Tr. 653-655), May 14, 1974.

are Marcella's" or do you believe they belong to somebody else in the car? And do you realize how they got into—you have to go from one little thing to the next, you know. It would be very easy for this jury just to say, "Look, I don't want to hear from that lawyer. He can go to hell. The guns are in the purse, and she is going for the guns." There won't be anything I can do if you want to go that route, but be a little thoughtful in your examination about the way they were jammed in there. She didn't put the guns in there; they are not her guns.

Excerpt from Summation to the Jury by Counsel to Respondents Hardrick and Allen (Tr. 653-655), May 14, 1974.

(653) One more thing. You know, different people live in different cultures and different societies. You may think that the way Hardrick has his hair done up is unusual; it may seem strange to you. People live differently. You saw the acting judge here the other day from Onteora, the young kid; his (654) hair was in an Afro style, too, wasn't it? It is not unusual. You have to understand this is the nature of the people. Sometimes people do other things. For example, if you were living under their times and conditions and you traveled from a big city, Detroit, to a bigger city, New York City, it is not unusual for people to carry guns, small arms to protect themselves, is it? There are places in New York City policemen fear to go. But you have got to understand; you are sitting here as jurors. These are people, live flesh and blood, the same as you, different motives, different objectives.

The small arms were in the pocketbook, it is true. The question is, who did they belong to? If you think that Hardrick and Allen had exercised dominion and control over the weapons in the purse, then follow the law as the Judge gives it to you on the presumption of what was in the purse as to all four or three or two or one.

Is it reasonable to assume that the purse being in the front seat that one of the guns belonged to Lemmons? There is no proof that my two men put these guns into the pocketbook. There is no proof (655) at all. It is only conjecture, and you may very well conjecture that way, but, importantly, there is no evidence that Hardrick and Allen had knowledge of what was in that trunk, and if you are going to rely and convict on the type of investigation that the police conducted in this case, you are going to have to take a strong and hard line.

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

(729) The Court: Ladies and gentlemen of the jury, we now come to that part of the case, as I mentioned yesterday, where the Court must charge the jury as to the law of this case so that you may apply that law to the facts as you find them during your deliberations.

I must inform you at the very outset that in this case, as in every other case that comes into (730) a court of this jurisdiction, you have one province, and I have another. Yours is the province of the fact; mine, as the Court, is the province of the law. According to our system of justice, it is provided that the Court decides all questions of law

which arise in the course of the trial and that I must charge you, as members of this jury, on all matters of law which I think necessary for your information in reaching a verdict.

• • •

(734) Under our law, every defendant in a criminal trial starts the trial with the presumption in his favor that he is innocent, and this presumption follows him throughout the entire trial and remains with him until such time as you, by your verdict, find him or her guilty beyond a reasonable doubt or innocent of the charge. If you find him or her not guilty, then, of course, this presumption ripens into an established fact. On the other hand, if you find him or her guilty, then this presumption has been overcome and is destroyed.

Our law provides also that the burden of proving the defendant's guilt rests upon the shoulders of the People, and such guilt must be established beyond a reasonable doubt before any (735) conviction can result. This burden never shifts. In other words, it rests upon the shoulders of the People through the entire trial and never shifts to the shoulders of the defendant. The defendant at no time is ever called upon to establish his innocence or to prove any defense whatsoever. It is the burden of the People to establish to your satisfaction beyond a reasonable doubt—each of your satisfactions—that these defendants committed the crimes they were accused of having committed. If they have proved this to you to your satisfaction, that is the burden of the People. As I said before, the defendants do not have to prove anything.

• • •

You have heard the term "reasonable doubt" mentioned here many times, particularly during the course of the selec-

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

tion of the jury. As you probably know, our law provides that in criminal (736) cases the norm of proof is reasonable doubt because our law provides that in case of a reasonable doubt, whether the guilt of a defendant is satisfactorily shown, he is entitled to an acquittal. That simply means that if a juror entertains a doubt as to the guilt of the defendant, it must be such a doubt for which the juror could give a reasonable explanation if he were requested to do so. It must be a doubt founded on common sense, one for which the juror could reasonably and logically account. A reasonable doubt is what the words themselves imply—a doubt founded in reason. It is not a mere whim, a guess or surmise, nor is it a mere subterfuge to which resort may be had to avoid doing a disagreeable thing. It is such a doubt as a reasonable man may entertain after a careful and honest consideration and review of the evidence. It must be founded in reason and must survive the test of reasoning or the mental process of reasonable examination.

Our law, in substance, provides that the People must prove the guilt of a defendant in a criminal case beyond a reasonable doubt. Our law does not say that the People must prove the guilt of (737) a defendant beyond a doubt based in reason. It does not say that the People must prove the guilt of a defendant beyond all doubt. Reasonable doubt may arise from the evidence itself, as you heard it from the lips of the witnesses here, or from a lack of evidence.

• • •

(742) As I said before, these are what I consider to be possessory crimes. Possession, as defined in our Penal Law, mean to have physical possession or otherwise to exercise dominion and control over tangible property such as we have here—the drugs, the machine gun and the two handguns. As so defined, possession means actual physical

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

possession, just as having the drugs or the weapsons in one's hand, in one's home or other place under one's exclusive control, or constructive possession which may exist without personal dominion over the drugs or weapons but with the intent and ability to retain such control or dominion.

• • •

(743) Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.

In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.

To prove their accusations beyond a reasonable doubt, the People here introduced evidence—and I am going to very briefly outline it—to establish the stopping of the automobile on the Thruway; that the automobile was occupied by the four defendants at the time the automobile was stopped; that two concealable weapons or handguns (744) were found in the purse of one of the defendants which was either on the front seat or on the floor in the front of the automobile;

• • •

(745) Now, in order to find any of the defendants guilty of the unlawful possession of the weapons, the machine

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

gun, the .45 and the .38, you must be satisfied beyond a reasonable doubt that the defendants possessed the machine gun and the .45 and the .38, possessed it as I defined it to you before. I want to emphasize that insofar as the guns are concerned, the mere possession of the machine gun, the .45 and the .38 is the essence of the crime of illegal possession, and guilty knowledge of such possession or (746) an intent to illegally possess such machine gun and other weapons is not a necessary element of the crime with which these defendants are charged.

Accordingly, you would be warranted in returning a verdict of guilt against the defendants or defendant if you find the defendants or defendant was in possession of a machine gun and the other weapons and that the fact of possession was proven to you by the People beyond a reasonable doubt, and an element of such proof is the reasonable presumption of illegal possession of a machine gun or the presumption of illegal possession of firearms, as I have just before explained to you.

There is a difference in the presumption insofar as the dangerous drug is concerned. The presumption says, "presumed knowing possession." Insofar as the weapons is concerned, all you need is possession, and then the presumption says it is illegal.

• • •

(749) (The following proceedings were held outside of the presence of the jurors.)

The Court: Are there any exceptions to the charge by the Prosecution?

Miss Donovan: No, Your Honor.

The Court: By Defense?

Mr. Goldberger: Yes, Judge. Just one second. I believe these exceptions are taken on behalf of all of the defend-

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

ants. First of all, I except to Your Honor's use of the word and the term "innocence" in regard to a jury verdict. On at least two occasions the Court used the term "innocent." The term should not be used.

The Court: Guilty or not guilty you mean, right?

(750) Mr. Goldberger: Secondly, I except to the fact that the Court did not charge the jury on the question of reasonable doubt that they have to find the defendant guilty beyond a reasonable doubt and for a moral certainty. The term "moral certainty" was not used by the Court.

Thirdly, I except to the fact that when the Court charged that the jury must not go outside of the evidence that it failed to immediately qualify that by saying "but of course may consider the lack of evidence in the case."

I fourthly except to the Court's improper explanation of the stipulation. I think the Court confused the stipulation. I think what the Court did by explaining the stipulation was that it inferred guilt of the defendants through that stipulation.

The Court: Will you expound on that?

Mr. Goldberger: I don't recall exactly what the Court said with regard to the stipulation, but I think the Court said that we stipulated that the guns were possessed unlawfully. We have never stipulated to that.

(751) The Court: I thought you did.

Mr. Goldberger: No. We only stipulated to the fact that the guns were operable.

The Court: Is there any contention they were unlawfully possessed?

Mr. Goldberger: There is a great contention that these defendants did not unlawfully possess the guns.

• • •

Mr. Goldberger: I also except to the fact (752) that the Court did not charge that contradictory evidence need not

be affirmative evidence but may be in the form of negative evidence or lack of evidence. I also except to the fact that the Court has not charged at least as of yet—and I request the Court to do so—that if there is a conflict among the members of the jury with regard to any item of fact, particularly the one item of fact totally in dispute here as to the clothes in the trunk of the car, that they be allowed to reread, have that portion of the testimony reread to them.

The Court: You maintain the Court must charge that?

Mr. Goldberger: I maintain the Court must charge that they have a right to reread the testimony if there is a conflict among the members of the jury.

I also except to the fact that in regard to the portion of the Court's charge dealing with weapons that the Court did not charge knowledge on the part of the defendant with regard to the possession of a weapon must be proved, not the mere possession.

The Court: Did you listen to my charge?

(753) Mr. Goldberger: Yes, I did.

The Court: You say I didn't say they had to prove knowledge?

Mr. Goldberger: In regard to the weapon part of the charge, it is my belief that the Court stated there was a difference in the presumptions; in that regard to the weapons they just had to prove possession.

The Court: The weapons, that's correct; and that's the law.

Mr. Goldberger: Well, I except to that. I don't agree that that is the law.

Mr. Klein: I have one further exception to make. I presume my colleagues join with me. The Court in marshalling the facts—

The Court: I didn't marshal any facts.

Mr. Klein: Well, the Court in whatever exposition of facts was given stated that it was the contention of the Prosecution that the handbag containing hadguns was either on the seat or on the floor. This is not only not their contention, it was contrary to the indictment in this case.

The Court: I don't understand that. What (754) do you mean? Please explain. I said very clearly that the testimony was it was either on the seat or on the front floor. Wasn't that a fact?

Mr. Klein: I say the indictment here is based not on an "either or."

The Court: When does it say in the indictment?

Mr. Klein: The indictment is based upon the Grand Jury testimony.

The Court: It says here "they possessed it." That is all they say in the indictment. I can't understand you.

Mr. Klein: I know that, on the basis of the Grand Jury testimony, and there is only one theory in the testimony.

The Court: What is the theory?

Mr. Klein: The testimony of the Grand Jury was that it was on the seat of the car, not either on the seat or the floor.

The Court: Suppose the jury finds it was on the floor; does that do away with the indictment?

Mr. Klein: I am only asking in fairness—

The Court: In fairness of what?

(755) Mr. Klein: That there is not an "either or" proposition in this case.

The Court: I am sorry. I don't understand you. Mr. Torraca?

Mr. Torraca: Mr. Goldberger and Mr. Klein expressed them, and I join in the motion.

The Court: What motion?

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

Mr. Torraca: All the motions Mr. Goldberger made.
The Court: There are no motions before me.
Mr. Torraca: Well, the requests to charge.
The Court: There is only one request that I have.
Mr. Goldberger: All the others were exceptions.
Mr. Torraca: Exceptions.
The Court: Well, I want the record to be clear. I think I will bring the jury back to clarify that stipulation because I thought that the stipulation said that the possession was unlawful possession.
Mr. Goldberger: Absolutely not. The only (756) thing that stipulation says is that the drugs were heroin and that the guns were operable and that if the experts were called that they would so testify.
The Court: Is that correct, Miss Donovan?
Miss Donovan: Yes.
The Court: All right. Bring the jury back.
(The jury returned to the Courtroom, and the following proceedings were had:)
The Court: Counsel were nice enough while you were out to call to my attention a portion of my charge which needs some clarification because I was under the impression that the stipulation which I mentioned during the course of my charge said something that apparently it did not say.

• • •

(757) I come back to the stipulation relative to the weapons where again I said that I was under (758) the impression that the stipulation also said that the possession of the weapons was illegal or unlawful. I am sorry. I said that they had stipulated, one, it was a machine gun; two, that the firearms were loaded. One was a .45 caliber, and the other was a .38 caliber, and I thought the stipulation said that they didn't have the right to possess it or their possession was unlawful. Apparently the stipulation did not say that.

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

I charge you that it is unlawful or illegal for a person to have in his possession a machine gun. It is unlawful or illegal for a person to have in his possession any loaded firearms unless that person has a license to carry those loaded firearms or unless that person comes under one of the exemptions in the Penal Law permitting the having of machines guns—for instance, the army can have machine guns; that does not violate the statute—or permitting the possession of loaded firearms.
And I charge you that under the facts of this case, as developed here during this trial, the (759) defendants do not come under any of the exemptions in the Penal Law authorizing the possession of machine guns or loaded firearms.
I assume there are exceptions to that charge?
Mr. Goldberger: I still at this point have to except to Your Honor's explanation. I still don't think it is the proper—
The Court: All right. You have excepted.
Mr. Goldberger: Yes.
The Court: Everybody else joins; is that right?
Mr. Goldberger: Yes, they do.
The Court: Are there any requests by the People?
Miss Donovan: Only as submitted yesterday, Your Honor. I submitted one matter.
The Court: I think I covered that in my charge. Now, are there any requests by the Defense?
Mr. Goldberger: I submitted one this morning.
The Court: As set forth in Defendant Murphy Exhibit B?
(760) Mr. Goldberger: It applies to all defendants, Judge.

Excerpts from Trial Transcript (pp. 729-730; 734-737; 742-746; 749-760; 765-766).
Charge to Jury.

The Court: I will charge that request. The presumption or presumptions which I discussed with the jury relative to the drugs or weapons in this case need not be rebutted by affirmative proof or affirmative evidence but may be rebutted by any evidence or lack of any evidence in the case.

Mr. Klein: May it please the Court, I did make a request for an additional charge during the absence of the jury.

The Court: It is news to me.

Mr. Goldberger: Concerning the rereading.

Mr. Klein: The rereading of testimony.

The Court: I am not going to grant the request.

Mr. Klein: I didn't understand you made a decision.

The Court: I didn't know it was a request. It was an exception, not a request.

Swear the bailiffs.

(The bailiffs were duly sworn.)

• • •

(765) (Whereupon, at 12:10 p.m., the jury again retired to enter upon further deliberation. At 12:30 p.m., the jury was taken to lunch and returned therefrom at 2:00 p.m. and again entered upon their deliberations, and at 3:45 p.m. the jury returned to the Courtroom, and the following proceedings were had:)

(766) The Court: Call the roll.

(A roll call of the jurors showed all jurors present.)

The Court: Let the record indicate the presence of the defendants in the Courtroom together with their respective attorneys. I have here a request from the jury which reads as follows: "In the event the jury cannot reach agreement on one or more counts but is in agreement on the other counts, does this result in a hung jury on all counts?"

The answer to that question is, "No, it does not." Does that answer your question?

Affirmation of Joseph Torraca and Memorandum of Law in Support of Respondents' Motion to Set Aside the Verdict (June 3, 1974).

The Foreman: Yes, Your Honor.

The Court: Any exceptions to that charge?

Mr. Goldberger: No, Your Honor.

Mr. Torraca: No.

Miss Donovan: No.

(Whereupon, at 4:47 p.m., the jury again retired to enter upon their deliberations and at 5:45 p.m. returned and rendered the following verdict:)

Affirmation of Joseph Torraca and Memorandum of Law in Support of Respondents' Motion to Set Aside the Verdict (June 3, 1974).

STATE OF NEW YORK
COUNTY COURT—COUNTY OF ULSTER

PEOPLE OF THE STATE OF NEW YORK,

—against—

MELVIN LEMMONS, RAYMOND HARDRICK and SAMUEL ALLEN,

Defendants.

AFFIRMATION

JOSEPH TORRACA, being an attorney duly admitted to practice in the Courts of this State, under penalty of perjury, affirms as follows:

1. I am the attorney for Raymond Hardrick and Samuel Allen.

Affirmation of Joseph Torraca and Memorandum of Law in Support of Respondents' Motion to Set Aside the Verdict (June 3, 1974).

2. Pursuant to an agreement reached with Aaron Klein, attorney for Melvin Lemmons, this motion is being submitted on behalf of the three above-named defendants.

3. Defendants move for an order setting aside the verdict on the grounnd that the evidence was insufficient as a matter of law and that the resort to the presumption set out in § 265.05 was improper both statutorily and constitutionally. The reasons therefore are set out with more particularity in the memorandum of law annexed to and thereby made a part of this motion.

WHEREFORE, defendants respectfully request that the verdict of guilty be set aside and the indictment dismissed or in the alternative that they be granted a new trial.

Dated: New Paltz, New York
June 3, 1974.

Joseph Torraca
JOSEPH TORRACA

Affirmation of Joseph Torraca and Memorandum of Law in Support of Respondents' Motion to Set Aside the Verdict (June 3, 1974).

MEMORANDUM OF LAW

The only evidence in this case pertaining to the charge for which defendants Lemmons, Hardrich and Allen were convicted was that two guns were found in defendant Murphy's pocketbook. This pocketbook was found on the floor of the car near where Murphy had been sitting.

Under these circumstances, the conviction of Lemmons, Hardrich and Allen for possession of these weapons cannot stand.

First, under the very terms of the statute, § 265.15 P. L., no presumption can arise where the weapon is found on the person of a particular party. Here, the possession of the guns can only be attributed to Murphy. These weapons were found in her pocketbook. A woman's pocketbook is clearly on her person and numerous cases have, in analogous circumstances, so held. For example in *People* v. *Pugach*, 15 N.Y. 2d 65 (1964), cert. denied, 380 U.S. 936, the Court of Appeals upheld the "frisk" of defendant's brief case even after it had been taken from defendant and was in possession of a police officer. The Court stated:

> The fact that the loaded gun was found concealed in the brief case, rather than in a pocket of defendant's clothing, affords no ground for saying that this "frisk" was in reality a constitutionally protected search. The loaded firearm concealed in the brief case carried in the hands of the defendant was in the language of the statute "concealed upon his person" (Penal Law, § 1897). Id. at 69.[1]

---

[1] It should be noted that § 1897 is the predecessor to § 265.

People v. *Moore,* 32 N.Y.2d 67, 71 (1973) ("frisk" of defendant's handbag permitted). See, *People* v. *Bowles,* 29 A.D. 2d 996 (3d Dept., 1968) ("frisk" of defendant's trousers which were on the floor of defendant's room).

It is clear, that contraband contained in the handbag of one of the passengers of an automobile is contraband "concealed upon the person" of that occupant and that occupant alone. The mere fact that at the time of the discovery and seizure Murphy was not physically holding her bag is not significant.

In *Pugach,* the discovery was made after the police had custody of the brief case.

In *Moore,* the same is so of the handbag.

In *Bowles,* the same is true of the trousers.

See, *People* v. *Davis,* 52 Misc. 2d 184, 185 (Sup. Ct., Queens Co., 1966); *People* v. *Desthers,* 343 N.Y.2d 887 (Crim. Ct. City of N.Y., N.Y. Co., 1973); *People* v. *Garcia,* 41 A.D. 2d 560 (2d Dept., 1973).

Moreover, Murphy was the only woman in the automobile and the pocketbook was seen between her leg and the door immediately prior to the seizure.

Under those circumstances the presumption set out in § 265.15 cannot arise as to Lemmons, Hardrich or Allen.

Second, if the presumption is applicable here, then it is unconstitutional as applied.

In *Leary* v. *United States,* 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id. at 36.

The New York test has been held to conform to that set out in *Leary*; though the actual language is somewhat dif-

ferent (i.e. "based on life and life's experiences", there is a "fair", "natural" and "rational" connection between the fact proved and the fact to be presumed or inferred). *People* v. *McCaleb,* 25 N.Y.2d 394, 400-401 (1969); *People* v. *Terra,* 303 N.Y. 332, 335 (1951) app. dism'd. 342 U.S. 938; *People* v. *Reisman,* 29 N.Y.2d 278, 286 (1971).

Assuming that the presumption is constitutional on its face (*People* v. *De Leon,* 32 N.Y.2d 944 (1973)), it is clearly unconstitutional as applied. There can be no "substantial assurance" that a defendant in a car is more likely than not to know what is on the person of other occupants of the car.[2] *State* v. *Lewis,* 225 ATL. 2d 582, 584 (Superior Ct., of New Jersey, App. Div., 1966). In the practice commentary to § 220.25 (dealing with possession of drugs in an automobile) Messrs. Denzer and McQuillan state:

> While thus broadening the automobile presumption in one respect, the revised section narrows it in another with the logical limitation that it does not apply where "the drug is concealed upon the person of one of the occupants" (cf. former Penal Law § 1751(4)). *In that situation, no sound basis exists for presuming possession by any of the other occupants;* yet in the absence of the indicated proviso, the former provision was rigidly construed as not allowing of any exception in such cases (*People* v. *Potter,* 1956, 4 Misc.2d 796, 162 N.Y.S.2d 439). Apart from the inherent injustice of that proposition, it was inconsistent with a similar provision of the former Penal Law dealing with weapons found in automobiles, which expressly excluded such cases from the scope of the presumption (§ 1899 (3a);

---

[2] Even though, technically, the possessions of those in the car are "contents" of the car.

Affirmation of Joseph Torraca and Memorandum of Law in Support of Respondents' Motion to Set Aside the Verdict (June 3, 1974).

see, also, Revised Penal Law § 265.15(3a)). (emphasis supplied)

Without resort to the presumption, the evidence is totally insufficient to sustain the conviction. *People* v. *Di Landri,* 250 App. Div. 52 (1st Dept., 1937).

> It cannot be held with any degree of certainty that the revolver which was found on the floor of the car belonged to the defendant or was in his constructive possession rather than in the possession of one of the other occupants of the car. The defendant's guilt, therefore, was not established beyond a reasonable doubt. Id. at 52.

People ex rel. De Feo v. *Warden of City Prison,* 136 Misc. 836 (Sup. Ct. Kings Co., 1930) (and cases cited therein).

In fact, the statutory presumption was enacted in 1936 to meet this difficulty. *People* v. *Rogan,* 94 N.Y.S.2d 681, 683 (Sup. Ct., Kings Co., 1949).

Or as the Appellate Division, First Department stated:

> Before enactment of § 1898-a of the Penal Law (now superseded by Penal Law, §§ 1899, 1900),[3] mere presence in an automobile of a pistol and several persons was insufficient to establish constructive possession of the pistol by any of the persons. *People* v. *Anthony,* 21 A.D.2d 666 (1st Dept., 1964).

In conclusion, it is apparent that the statutory presumption set out in § 265.15 cannot apply to those who were merely occupants of this car. This is so both statutorily and constitutionally. Without this presumption there can be no legal conviction of Lemmons, Hardrich or Allen.

---

[3] Now superseded by § 265.15 P. L.

Excerpt from Respondents' Brief to the Appellate Division, Third Department.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

SAMUEL ALLEN, RAYMOND HARDRICH, MELVIN LEMMONS and MARCELLA MURPHY,

Defendants-Appellants.

Preliminary Statement

In County Court, County of Ulster, appellants Melvin Lemmons, Raymond Hardrich, Samuel Allen and Marcella Murphy were each convicted of two counts of possession of a gun as a felony.

On June 28, 1974, Defendants Hardrich and Allen were sentenced to seven years imprisonment on each count, said sentences to run concurrently (Mino, J.).

On August 22, 1974, Appellant Lemmons was sentenced to seven years imprisonment on such count; sentences to run concurrently. Appellant Murphy was sentenced to probation (Mino, J.).

Timely notices of appeal were filed on behalf of all the appellants.

Excerpt from Respondents' Brief to the Appellate Division, Third Department.

• • • •

POINT II

The evidence was insufficient to support the conviction of Lemmons, Hardrich and Allen

The only evidence in this case pertaining to the charge for which defendants Lemmons, Hardrich and Allen were convicted was that two guns were found in defendant Murphy's pocketbook. This pocketbook was found on the floor of the car near where Murphy had been sitting.

Under these circumstances, the conviction of Lemmons, Hardrich and Allen for possession of these weapons cannot stand.

First, under the very terms of the statute Section 265.16 P.L., no presumption can arise where the weapon is found on the person of a particular party. Here, the possession of the guns can only be attributed by Murphy. These weapons were found in her pocketbook. A woman's pocketbook is clearly on her person and numerous cases have, in analogous circumstances, so held. For example, in *People* v. *Pugach*, 15 N.Y. 2d 65 (1964), cert. denied 380 U.S. 936, the Court of Appeals upheld the "frisk" of defendant's brief case even after it had been taken from defendant and was in possession of a police officer. The Court stated:

> The fact that the loaded gun was found concealed in the brief case, rather than in a pocket of defendant's clothing, affords no grounds for saying that this "frisk" was in reality a constitutionally protected search. The loaded firearm concealed in the brief case carried in the hands of the defendant was in the language of the statute "concealed upon his person" (Penal Law Section 1897). Id at 69[19]

People v. *Moore*, 32 N.Y.2d 67, 71 (1973) ("frisk" of defendant's handbag permitted). See *People* v. *Bowles*, 29

Excerpt from Respondents' Brief to the Appellate Division, Third Department.

A.D. 2d 996 (3d Dept., 1968) ("frisk" of defendant's trousers which were on the floor of defendant's room).

It is clear, that contraband contained in the handbag of one of the passengers of an automobile is contraband "concealed upon the person" of that occupant and that occupant alone. The mere fact that at the time of the discovery and seizure Murphy was not physically holding her bag is not significant.

In *Pugach*, the discovery was made after the police had custody of the brief case. In *Moore*, the same is so of the handbag. In *Bowles*, the same is true of the trousers. *People* v. *Davis*, 52 Misc. 2d 184, 185 (Sup. Ct., Queens Co. 1966); *People* v. *Desthers*, 343 N.Y.2d 887 (Crim. Ct., City of N.Y., N.Y. Co. 1973); *People* v. *Garcia*, 41 A.D.2d 560 (2d Dept. 1973); *People* v. *Rivera*, N.Y.L.J. 9/18/74 p. 17 Col. 6 (Special Narcotics Court, N.Y.C., 1974).

Moreover, Murphy was the only woman in the automobile and the pocketbook was seen between her leg and the door immediately prior to the seizure.

Under those circumstances the presumption set out in Section 265.15 cannot arise as to Lemmons, Hardrich and Allen.

Second, if the presumption is applicable here, then it is unconstitutional as applied.

In *Leary* v. *United States*, 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id. at 36.

---

[19] It should be noted that Section 1897 is the predecessor to Section 265 P.L.

Excerpt from Respondents' Brief to the Appellate Division, Third Department.

The New York test has been held to conform to that set out in *Leary;* though the actual language is somewhat different (i.e. "based on life and life's experiences", there is a "fair", "natural" and "rational" connection between the fact proved and the fact to be presumed or inferred). *People* v. *McCaleb,* N.Y.2d 394, 400-401 (1969); *People* v. *Terra,* 303 N.Y. 332, 335 (1951) app. dism'd 342 U.S. 938; *People* v. *Reisman,* 29 N.Y.2d 278, 286 (1971).

Assuming that the presumption is constitutional on its face, *People* v. *De Leon,* 32 N.Y.2d 944 (1973), it is clearly unconstitutional as applied. There can be no "substantial assurance" that a defendant in a car is more likely than not to know what is on the person of other occupants of the car[20] *State* v. *Lewis,* 225 A.D.2d 582, 584 (Superior Ct., of New Jersey, App. Div., 1966). In the practice commentary to Section 220.25 (dealing with possession of drugs in an automobile) Messrs. Denzer and McQuillan state:

> While thus broadening the automobile presumption in one respect, the revised section narrows it in another with the logical limitation that it does not apply where "the drug is concealed upon the person of one of the occupants" (cf. former Penal Law Section 1751 (4)). *In that situation, no sound basis exists for presuming possession by any of the other occupants;* yet in the absence of the indicated proviso, the former provision was rigidly construed as not allowing of any exception in such cases (*People* v. *Potter,* 1956, 4 Misc. 2d 796, 162 N.Y.S.2d 439). Apart from the inherent injustice of that proposition, it was inconsistent with a similar provision of the former Penal Law dealing with weap-

[20] Even though, technically, the possession of those in the car are "contents" of the car.

Excerpt from Respondents' Brief to the Appellate Division, Third Department.

> ons found in automobiles, which expressly excluded such cases from the scope of the presumption (Section 1899 (3a)) (Emphasis supplied).

See, also, Revised Penal Law Section 265.15 (3a).

Without resort to the presumption, the evidence is totally insufficient to sustain the conviction. *People* v. *Di Landri,* 250 App. Div. 52 (1st Dept., 1937)

> It cannot be held with any degree of certainty that the revolver which was found on the floor of the car belonged to the defendant or was in his constructive possession rather than in the possession of one of the other occupants of the car. The defendant's guilt, therefore, was not established beyond a reasonable doubt. Id. at 52.

People ex rel. De Feo v. *Warden of City Prison,* 136 Misc. 836 (Sup. Ct., Kings Co., 1930) (and cases cited therein); *People* v. *Rivera,* N.Y.L.J. 9/18/74 p. 17 col. 6 (Spec. Narc. Ct., NY Co., 1974).

In fact, the statutory presumption was enacted in 1936 to meet this difficulty. *People* v. *Rogan,* 94 N.Y.S. 2d 681, 683 (Sup. Ct., Kings Co., 1949).

Or as the Appellate Division, First Department stated:

> Before enactment of Section 1898-a of the Penal Law (now superseded by Penal Law, Sections 1899, 1900),[21] mere presence in an automobile of a pistol and several persons was insufficient to establish constructive possession of the pistol by any of the persons. *People* v. *Anthony,* 21 A.D. 2d 666 (1st Dept., 1964).

[21] Now superseded by Section 265.15 P.L.

Excerpt from Respondents' Brief to the Appellate Division, Third Department.

In conclusion, it is apparent that the statutory presumption set out in Section 265.15 cannot apply to Lemmons, Allen or Hardrich. This is so both statutorily and constitutionally. Without this presumption there can be no legal conviction of Lemmons, Hardrich or Allen. Even if there had been evidence outside the presumption to sustain the conviction,[22] the conviction still cannot be sustained. The Court charged the jury on the presumption and Lemmons, Hardrich and Allen are entitled, at the very least, to a new trial.

[22] An example of this would be if Appellants' fingerprints had been found on these guns. The presumption would not apply but there would still be evidence of possession.

To be argued by:
J. JEFFREY WEISENFELD
Time: 25 minutes

Excerpt from Respondents' Brief to the New York Court of Appeals.

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

SAMUEL ALLEN, RAYMOND HARDRICH,
MELVIN LEMMONS and JANE DOE,

Defendants-Appellants.

APPELLANTS' BRIEF

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Defendants-Appellants
401 Broadway
New York, New York
925-2105

J. JEFFREY WEISENFELD
On the Brief

Excerpt from Respondents' Brief to the New York Court of Appeals.

TABLE OF CONTENTS

Excerpt from Respondents' Brief to the New York Court of Appeals.

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

SAMUEL ALLEN, RAYMOND HARDRICH, MELVIN LEMMONS and JANE DOE,

Defendants-Appellants.

APPELLANTS' BRIEF

Preliminary Statement

In County Court, County of Ulster, appellants Melvin Lemmons, Raymond Hardrich, Samuel Allen and Jane Doe* were each convicted of two counts of possession of a gun as a felony. Subsequently the conviction of Doe was replaced by a youthful offender, adjudication.

On June 28, 1974, Hardrich and Allen were sentenced to seven years imprisonment on each count, said sentences to run concurrently (Mino, J.).

On August 22, 1974, Appellant Lemmons was sentenced to seven years imprisonment on such count; sentences to run concurrently. Appellant Doe was sentenced to probation (Mino, J.).

* Fictitious name.

Excerpt from Respondents' Brief to the New York Court of Appeals.

Timely notices of appeal were filed on behalf of all the appellants and on July 2, 1975, the Appellate Division Third Department affirmed the judgment of conviction without a written opinion. Two justices concurring in part and dissenting in part in a written decision.

On August 6, 1975, Hon. Louis M. Greenblott, granted leave to appeal to the Court of Appeals and a timely notice of appeal was filed August 19, 1975.

Issues Presented

1. Whether the motion to suppress should have been granted?

2. Whether the testimony of officer Askew supporting a finding of "plain view," was incredible as a matter of law?

3. Whether the evidence that two guns were found in the pocket book of appellant Doe was sufficient to sustain the conviction of the other appellants?

4. Whether the trial court's charge on reasonable doubt requires a new trial?

• • • •

POINT II

The evidence was insufficient to support the conviction of Lemmons, Hardrich and Allen.

The only evidence in this case pertaining to the charge for which defendant Lemmons, Hardrich and Allen were convicted was that two guns were found in defendant Doe's pocketbook. This pocketbook was found on the floor of the car near where Doe had been sitting.

Under these circumstances, the conviction of Lemmons, Hardrich and Allen for possession of these weapons cannot stand.

Excerpt from Respondents' Brief to the New York Court of Appeals.

First, under the very terms of the statute Section 265.16 P.L., no presumption can arise where the weapon is found on the person of a particular party. Here, the possession of the guns can only be attributed by Doe. These weapons were found in her pocketbook. A woman's pocketbook is clearly on her person and numerous cases have, in analogous circumstances, so held. For example, in *People* v. *Pugach,* 15 N.Y. 2d 65 (1964), cert. denied 380 U.S. 936, the Court of Appeals upheld the "frisk" of defendant's brief case even after it had been taken from defendant and was in possession of a police officer. The Court stated:

> The fact that the loaded gun was found concealed in the brief case, rather than in a pocket of defendant's clothing, affords no grounds for saying that this "frisk" was in reality a constitutionally protected search. The loaded firearm concealed in the brief case carried in the hands of the defendant was in the language of the statute "concealed upon his person" (Penal Law Section 1897). Id at 69.[16]

People v. *Moore,* 32 N.Y.2d 67, 71 (1973) ("frisk" of defendant's handbag permitted). *See People* v. *Bowles,* 29 A.D. 2d 996 (3d Dept., 1968) ("frisk" of defendant's trousers which were on the floor of defendant's room).

It is clear, that contraband contained in the handbag of one of the passengers of an automobile is contraband "concealed upon the person" of that occupant and that occupant alone. The mere fact that at the time of the discovery and seizure Doe was not physically holding her bag is not significant.

In *Pugach,* the discovery was made after the police had custody of the brief case. In *Moore,* the same is so of the handbag, and in *Bowles,* the same is true of the trousers. *People* v. *Davis,* 52 Misc. 2d 184, 185 (Sup. Ct., Queens

---

[16] Section 1897 is the predecessor to Section 265 P.L.

Excerpt from Respondents' Brief to the New York Court of Appeals.

Co. 1966); *People* v. *Desthers,* 343 N.Y.2d 887 (Crim. Ct., City of N.Y., N.Y. Co. 1973); *People* v. *Garcia,* 41 A.D. 2d 560 (2d Dept. 1973); *People* v. *Rivera,* N.Y.L.J. 9/18/74 p. 17 Col. 6 (Special Narcotics Court, N.Y.C., 1974).

Doe was the only woman in the automobile, the pocketbook was seen between her leg and the door immediately prior to the seizure. When questioned Doe admitted ownership. Moreover, there were documents in the purse which indicated Doe's ownership. Under these circumstances the presumption set out in Section 265.15 cannot arise as to Lemmons, Hardrich and Allen.

Second, if the presumption is applicable here, then it is unconstitutional as applied.

In *Leary* v. *United States,* 395 U.S. 6 (1969), the Supreme Court held that a presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact upon which it is made to depend. Id at 36.

The New York test has been held to conform to that set out in *Leary;* though the actual language is somewhat different (i.e., "based on life and life's experiences", there is a "fair", "natural" and "rational" connection between the fact proved and the fact to be presumed or inferred). *People* v. *McCaleb,* N.Y.2d 394, 400-401 (1969); *People* v. *Terra,* 303 N.Y. 332, 335 (1951) app. Dism'd 342 U.S. 938; *People* v. *Reisman,* 29 N.Y.2d 278, 286 (1971).

Assuming that the presumption is constitutional on its face, *People* v. *De Leon,* 32 N.Y.2d 944 (1973), it is clearly unconstitutional as applied. There can be no "substantial assurance" that a defendant in a car is more likely than not to know what is on the person of other occupants of the car.[17] *State* v. *Lewis,* 225 A.D.2d 582, 584 (Superior

[17] Even though, technically, the belongings of those in the car are "contents" of the car.

Excerpt from Respondents' Brief to the New York Court of Appeals.

Ct., of New Jersey, App. Div., 1966). In the practice commentary to Section 220.25 (dealing with possession of drugs in an automobile) Messrs. Denzer and McQuillan state:

> While thus broadening the automobile presumption in one respect, the revised section narrows it in another with the logical limitation that it does not apply where "the drug is concealed upon the person of one of the occupants" (cf. former Penal Law Section 1751 (4)). *In that situation, no sound basis exists for presuming possession by any of the other occupants;* yet in the absence of the indicated proviso, the former provision was rigidly construed as not allowing of any exception in such cases (*People* v. *Potter,* 1956, 4 Misc. 2d 796, 162 N.Y.S. 2d 439). Apart from the inherent injustice of that proposition, it was inconsistent with a similar provision of the former Penal Law dealing with weapons found in automobiles, which expressly excluded such cases from the scope of the presumption (Section 1899 (3a)) (Emphasis supplied).

See, also, Revised Penal Law Section 265.15 (3)(a).

Without resort to the presumption, the evidence is totally insufficient to sustain the conviction. *People* v. *Di Landri,* 250 App. Div. 52 (1st Dept., 1937).

> It cannot be held with any degree of certainty that the revolver which was found on the floor of the car belonged to the defendant or was in his constructive possession rather than in the possession of one of the other occupants of the car. The defendant's guilt, therefore, was not established beyond a reasonable doubt. Id at 52.

People ex rel. De Feo v. *Warden of City Prison,* 136 Misc. 836 (Sup. Ct., Kings Co., 1930) (and cases cited therein); *People* v. *Rivera,* N.Y.L.J. 9/18/74 p. 17 col. 6 (Spec. Narc. Ct., NY Co., 1974).

Excerpt from Respondents' Brief to the New York Court of Appeals.

In fact, the statutory presumption was enacted in 1936 to meet this difficulty. *People* v. *Rogan,* 94 N.Y.S. 2d 681, 683 (Sup. Ct., Kings Co., 1949).

> Or as the Appellate Division, First Department stated: Before enactment of Section 1898-a of the Penal Law (now superseded by Penal Law, Sections 1899, 1900),[18] mere presence in an automobile of a pistol and several persons was insufficient to establish constructive possession of the pistol by any of the persons. *People* v. *Anthony,* 21 A.D. 2d 666 (1st Dept., 1964).

In conclusion, it is apparent that the statutory presumption set out in Section 265.15 cannot apply to Lemmons, Allen or Hardrich. This is so both statutorily and constitutionally. Without this presumption there can be no legal conviction of Lemmons. Hardrich or Allen. Even if there had been evidence outside the presumption to sustain the conviction,[19] the conviction still cannot be sustained. The Court charged the jury on the presumption and Lemmons, Hardrich and Allen are entitled, at the very least, to a new trial.

---

[18] Now superseded by Section 265.15 P.L.

[19] An example of this would be if Appellants' fingerprints had been found on these guns. The presumption would not apply but there would still be evidence of possession.

Decision of the County Court, Ulster County, Denying Respondents' Motion to Suppress Evidence (February 8, 1974).

STATE OF NEW YORK, COUNTY COURT,

COUNTY OF ULSTER.

THE PEOPLE OF THE STATE OF NEW YORK,

against

MELVIN LEMMONS, RAYMOND HARDRICK, SAMUEL ALLEN and MARCELLA MURPHY,

Defendants.

(Ulster County, Special Term, Final Papers submitted Jan. 2, 1974)

(Judge RAYMOND J. MINO, Presiding)

Appearances:

Aaron Klein, Esq., Attorney for Defendant, Melvin Lemmons.

Joseph Torraca, Esq., Attorney for Defendants, Raymond Hardrick and Samuel Allen.

Paul Goldberger, Esq., Attorney for Defendant, Marcella Murphy.

Hon. Francis J. Vogt, District Attorney for the People of the State of New York, (Ellen G. Donovan, of counsel).

RAYMOND J. MINO, Judge:

Decision of the County Court, Ulster County, Denying Respondents' Motion to Suppress Evidence (February 8, 1974).

This case come before this Court on a motion to suppress (CPL 710.20) evidence consisting of two pistols, a machine gun and a quantity of heroin to be used against the four named defendants on various illegal possession charges.

The facts as found by this Court at the suppression hearing are:

On March 28, 1973, at noontime, two state troopers stopped a motor vehicle on the Thruway for speeding. This vehicle contained the four defendants. The vehicle had New York State plates, but the driver, Lemmons, had a Michigan driver's license and no vehicle registration at all. The trooper radioed from his patrol car the name of the driver and a description of the car. The return message informed the troopers that Lemmons was wanted on a fugitive warrant for a weapons charge in Michigan. Lemmons was thereupon placed under arrest. One trooper then returned to the defendant's car and stood by the window on the passenger side. From this position he peered into a large open handbag situated between the window and the front seat. He was familiar with handguns and recognized the top of a pistol in the handbag. He placed the three remaining defendants under arrest for the possession of the pistol. A further search of the handbag revealed a second pistol. All four defendants were brought to the trooper barracks. About two hours later another trooper drove the defendant's car to the barracks. The defendants had no key to the trunk so troopers pried open the locked trunk without a warrant. The trunk contained the machine gun and heroin.

A consideration of the law as applied to the facts recited above, must begin with the issue, whether the arrest of Lemmons was valid. It is a clear rule of law that a police officer may arrest a person for a crime when he has reasonable cause to believe that such person has committed a crime, whether in his presence or not (CPL § 140.10, subd. 1 [b]). Reasonable cause to believe is, of course, similar

Decision of the County Court, Ulster County, Denying Respondents' Motion to Suppress Evidence (February 8, 1974).

to probable cause (*People* v. *Lombardi*, 18 A. D. 2d 177, 18 N.Y. 2d 1014). The law is also clear that the arresting officer himself does not need the personal knowledge of the facts constituting probable cause. He may rely upon communications with other officers if the police as a whole have information sufficient to provide probable cause (*People* v. *Smith*, 31 A. D. 2d 863). That the information ultimately came from a sister state cannot invalidate any such arrest (CPL § 570.34). The only perplexing factor in our case is that the Michigan arrest warrant was dismissed several days before the incident on the Thruway. The radio information, therefore, was to that extent inaccurate. Our Appellate Division has spoken clearly that an arrest made pursuant to a warrant, which was invalid at that point in time, is still a lawful arrest (*People* v. *LaBelle*, 37 A.D. 2d 135). So, in our case, it must be held that the arrest of Lemmons was valid.

The second issue is, whether the seizure of the two pistols in defendant Murphy's handbag was valid. There can be no question that a police officer may validly seize contraband in plain view provided he has a legal right to be in the position from which this view was made (*Ker* v. *California*, 274 U.S. 23). The testimony of Trooper Askew was that he peered through the passenger window into the open handbag and from his experience immediately recognized the top of a pistol. The pistol was in plain view. The trooper had every right to stand next to the vehicle. Therefore, the seizure was lawful.

The third issue is whether the search of the trunk and the seizure of the contraband therein was valid. The objection to the search and seizure was that it was done without a warrant, at a time and place removed from the point of arrest. The Supreme Court has held that an entire car, including the trunk may be searched, without a warrant when probable cause exists for the search apart from

Decision of the County Court, Ulster County, Denying Respondents' Motion to Suppress Evidence (February 8, 1974).

the arrest (*Chambers* v. *Maroney*, 399 U.S. 42). This concept is known as independent probable cause. Our Court of Appeals recognizes that under this concept the limitations of space and time governing searches incident to an arrest do not apply (*People* v. *Brown*, 28 N. Y. 2d 282, 286). The Appellate Division, Third Department, has applied this theory to sustain warrantless searches of automobiles away from the point of the arrest provided probable cause existed for that search (See *People* v. *LaBelle, supra; People* v. *Baer*, 37 A. D. 2d 150). The facts of our case indicate that defendants Murphy, Hardrick and Allen had all been arrested for possession of pistols in the car. Also, Lemmons had been discovered as being wanted on a fugitive warrant on a weapons violation. Whether this warrant was outdated is certainly crucial to the validity of any arrest pursuant thereto, but the legal effectiveness of the warrant is irrelevant to any use of the warrant as just another fact which may go to support probable cause for a search, independent of an arrest. With all the people implicated in a weapons violation in some manner, was it not reasonable to believe that other weapons were present in the car. These facts which confronted the police dictated their action in entering the trunk. Their actions must be governed by the standard applied to "a reasonable and prudent man, not a legal technician." (*Brinegar* v. *U.S.*, 338 U.S. 130). The standard as applied to this case, shows that the officers did have probable cause to open that trunk. The denial by the defendants that they had a key, justified prying open the trunk (*People* v. *Baer, supra*).

The motion to suppress is in all respects denied.

So ordered.

Dated: February 8, 1974

s/ Raymond J. Mino
County Judge of Ulster County

Order of the United States District Court Granting Writ of Habeas Corpus, Filed April 21, 1977.

UNITED STATES DISTRICT COURT
Southern District of New York

Samuel Allen, Raymond Hardrick and Melvin Lemmons,

Petitioners,

—against—

County Court, Ulster County, New York, Warden, Woodbourne Correctional Facility, Woodbourne, New York.

76 Civ. 4794

Order

Whereas, this Court, on April 19, 1977, order that the application for a writ of habeas corpus of petitioners Allen, Hardrick and Lemmons be granted, it is hereby

Ordered, that the application for a writ of habeas corpus by petitioners Allen, Hardrick and Lemmons is granted, that their judgments of conviction and sentences in *People of the State of New York* v. *Lemmons et al.*, 25-73 be set aside, that indictment No. 25-73 be dismissed, and that any form of custody to which petitioners are being subjected or are to be subjected pursuant to their convictions and sentences in this case be terminated forthwith.

Dated: New York, New York

/s/
United States District Judge
Southern District of New York